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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 97-141
Competition in Markets for the	)	
Delivery of Video Programming	)	

REPLY COMMENTS OF BELL ATLANTIC[1]

Bell Atlantic files these reply comments to respond to the comments of Home Box Office (HBO) and Cablevision Systems Corporation (Cablevision). HBO argues that the program access rules should be eliminated. The experiences recounted by competitive providers of video programming, however, demonstrate that HBO is wrong. Instead, the Commission's program access rules, along with the underlying statute, should be amended to cover programming regardless of delivery method, and regardless of whether the owner is vertically integrated. In addition, the Commission should make clear that it will assess damages and fines where violations of the program access rules are found.

Cablevision continues its pattern of attempting to create obstacles for its competitors by arguing that the Commission should add onerous filing requirements to the certification process for open video systems (OVS). Cablevision's proposed additional requirements either are inappropriate or are already covered by the Commission's existing rules. All of them should be rejected.

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[1] The Bell Atlantic companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., Bell Atlantic Video Services Company, New York Telephone Company and New England Telephone and Telegraph Company.

I. The Program Access Statute And Rules Should Be Amended To Ensure That Consumers Have Access To Real Choices In Programming And Programming Providers.

Virtually every video delivery medium that competes with incumbent cable operators -- cable overbuilders,[2] DBS providers,[3] OVS operators,[4] and wireless cable[5] -- emphasizes that obtaining access to key programming is critical. All agree that the program access rules and the underlying statute need to be amended to ensure that consumers will benefit from real competition in their choice of video providers. Against this multi-voice chorus, HBO's claim that the program access rules should be eliminated sounds off-key.

According to HBO, the program line-ups attached to its comments "prove" that non-cable video providers have access to vertically-integrated programming and that the program access rules are no longer needed.[6] In fact they prove just the opposite. The CellularVision line-up includes SportsChannel New York, programming that CellularVision obtained only after it filed and won a program access complaint against SportsChannel Associates, an affiliate of Cablevision.[7] The FutureVision line-up does not contain SportsChannel New York -- FutureVision filed a program access complaint against Cablevision and Rainbow Programming Holdings, Inc. (Rainbow) to obtain that and other programming, which was dismissed as moot when the Commission's video dialtone rules were repealed.[8] Bell Atlantic Video Services Co.,

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2 Comments of Ameritech New Media, Inc.; Comments of BellSouth Corporation, BellSouth Interactive Media Services, Inc., and BellSouth Wireless Cable, Inc.

3 Comments of the National Rural Telecommunications Cooperative (NRTC).

4 Comments of Bell Atlantic and NYNEX.

5 BellSouth Comments; Comments of the Wireless Cable Association International, Inc.

6 HBO Comments at 4-5.

7 *CellularVision of New York, L.P. v. SportsChannel Associates,* 10 FCC Rcd 9273 (1995), *recon. denied,* 11 FCC Rcd 3001 (1996).

8 *In the Matter of Interface Communications Group, Inc., et al. v. Cablevision Systems Corp., et al.,* 1996 WL 523477 (F.C.C. 1996).

which took over FutureVision's programming when it acquired FutureVision's Dover Township, New Jersey assets, then filed and won a program access complaint against Rainbow and Cablevision concerning SportsChannel New York and other programming.[9] Bell Atlantic is currently in negotiations to obtain the programming the Commission ordered Rainbow to provide.

The other line-ups attached to HBO's comments represent "DBS," "MMDS" or wireless cable, and "telco overbuild" channel line-ups. As noted above, these non-cable video providers have emphasized that the program access rules should be amended, not eliminated.[10] Indeed, Ameritech New Media, BellSouth, and the Wireless Cable Association provide examples of discrimination by non-vertically integrated program providers in favor of incumbent cable operators and against cable's competitors.[11] In short, there is a continuing need for the program access rules; indeed, they should be extended to cover non-vertically integrated programming by whatever means it is delivered, and the Commission should award damages in program access violations to eliminate program owners' incentive to flout the rules.

II. The Commission's OVS Rules Already Address Cablevision's Concerns And Cablevision's Attempt To Erect More Roadblocks To Cable Competition Should Be Rejected.

Cablevision, in an attempt to divert attention from its own anti-competitive actions, launches an attack against open video systems, seeking to impose burdensome new requirements

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[9] *Bell Atlantic Video Services Co. v. Rainbow Programming Holdings, Inc.*, DA 97-1452, CSR 4983-P, Memorandum Opinion and Order (rel. July 11, 1997).

[10] NRTC Comments at 6-12; BellSouth Comments at 10-16; Wireless Cable Association Comments at 3-14; Ameritech New Media Comments at 14-28.

[11] Ameritech New Media Comments at 15-17; BellSouth Comments at 12-14; Wireless Cable Association Comments at 10-11.

on OVS operators. The Commission has already considered Cablevision's arguments and Cablevision's effort to impede competition should be rejected.

Cablevision asks, first, that the Commission require OVS applicants to provide detailed information in five categories, including (1) corporate structure and financing; (2) a statement of technical qualifications and network capabilities; (3) the applicant's intention to provide affiliated and non-affiliated OVS programming; (4) the applicant's compliance with existing legal obligations; and (5) local fees, local approvals, and communications with local authorities.[12] The Commission's rules already require applicants to provide a "statement of ownership, including all affiliated entities," and the "anticipated amount and type . . . of capacity" on the system. 47 C.F.R. §76.1502(c). In addition, applicants must state that they will comply with each of the Commission's enumerated regulations and with the Commission's notice and enrollment requirements for unaffiliated programmers. Id.; 47 C.F.R. §76.1502(a). All of the foregoing must be verified by an officer or director of the applicant under penalty of perjury. 47 C.F.R. §76.1502(b). Finally, the Commission's rules require that "on or before the date" the certification is filed with the Commission, the applicant must serve a copy on all local communities it plans to operate in, along with information about the Commission's requirements for filing oppositions and comments. 47 C.F.R. §76.1502(d). As a result, local authorities have an opportunity to bring to the Commission's attention any information they deem pertinent to the Commission's consideration of the certification.

Cablevision also argues that the Commission should require OVS operators to provide competitively sensitive information about their systems -- including activation dates and carriage rates -- to their direct competitors, even though incumbent cable operators are barred from

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12 Cablevision Comments at 4.

demanding carriage on open video systems in their franchised areas, 47 C.F.R. §76.1503(c)(2)(iv). This makes no sense. As the Commission has already noted, "[C]able operators may have different incentives for seeking open video system capacity than would MVPDs that do not have such market power. For instance, a cable operator may have an incentive to see that the open video system is not successful, and thus may seek to obtain capacity merely to protect and continue to exploit its market power."[13] Incumbent cable operators have the same improper incentives for seeking competitively sensitive information about the OVS.

Finally, Cablevision argues that the Commission should enforce build-out commitments "for the entire [OVS] service area territory authorized by the Commission."[14] According to Cablevision, failure to do so discriminates against non-affiliated programmers "that should have the opportunity to offer service to any potential subscriber," and discriminates against "those competing video delivery services that have made universal service commitments through their franchise obligations."[15] Cablevision's arguments are fundamentally flawed.

As the Commission has recognized, Congress clearly intended not to impose franchise-like requirements, such as build-out commitments, on OVS operators.[16] Instead, Congress expressly subjected OVS operators to "reduced regulatory burdens," and provided that Part III of Title VI, which governs franchises for cable systems, "shall not apply" to OVS. 47 U.S.C. §573(c). OVS operators' "reduced regulatory burdens," moreover, do not "discriminate against non-affiliated programmers." All programmers on the system have access to the same potential

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13 Third Report and Order, ¶ 49.
14 Cablevision Comments at 9.
15 Id. at 9-10.
16 Second Report and Order, ¶ 211.

subscribers. It would be completely inappropriate for non-affiliated programmers to dictate the OVS operator's service area or build-out plans.[17]

CONCLUSION

New entrants will have no chance of being viable competitors to incumbent cable operators unless they have access to key programming on nondiscriminatory terms. The Commission should amend its program access rules and recommend that Congress amend the statute to ensure that consumers have real choices among video program providers. Cablevision seeks to reopen arguments the Commission resolved just one year ago. The Commission's rules already address Cablevision's legitimate concerns, and the Commission should reject Cablevision's backdoor effort to impose new and onerous burdens on OVS operators.

Respectfully submitted,

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[17] *Cf.* Id. at ¶¶ 41-42 (affirming that the Act contemplates OVS operator's active role in structuring and managing platform, and rejecting requests that operator be required to delegate channel allocation responsibilities to independent entity).